

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 DAVID UPTON,) CASE NO. ED CV 10-253-ABC (PJW)
11)
12 Petitioner,) ORDER TO SHOW CAUSE WHY PETITION
13 v.) SHOULD NOT BE DISMISSED
14)
15 DIRECTOR OF CORRECTIONS,)
Respondent.)

16 On February 19, 2010, Petitioner filed a Petition for Writ of
17 Habeas Corpus, seeking to challenge the lawfulness of a parole
18 revocation proceeding. According to the Petition, he was convicted of
19 being a felon in possession of a loaded firearm in January 2006 and
20 sentenced to four years in custody.¹ (Petition at 2.) Thereafter, he
21 was released on parole. In January 2010, his parole was revoked,
22 resulting in an eight-month sentence, which he is currently serving.
23 (Petition, Exh. D.) In the Petition, he claims that constitutional
24 rights were violated in the January 2010 revocation proceedings.
25 (Petition at 3-14.)

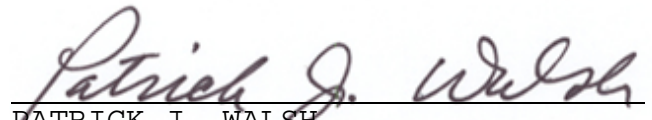
26
27
28 ¹ Petitioner has filed a separate habeas petition challenging
the underlying convictions, which is still pending before the Court.
(See *Upton v. State of California*, CV 07-1067-ABC (PJW).)

1 As a matter of comity between state and federal courts, a federal
2 court generally will not address the merits of a habeas corpus
3 petition unless the petitioner has first exhausted his state remedies,
4 i.e., sought state court review of every ground presented in the
5 petition by presenting it to the highest state court. *Rose v. Lundy*,
6 455 U.S. 509, 518-22 (1982). Indeed, the law governing habeas
7 petitions provides that a habeas petition brought by a person in state
8 custody *cannot be granted* "unless it appears that--(A) the applicant
9 has exhausted the remedies available in the courts of the State; or
10 (B)(I) there is an absence of available State corrective process; or
11 (ii) circumstances exist that render such process ineffective to
12 protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). To
13 exhaust state remedies, a petitioner must fairly present his
14 contentions to the state courts, and the highest court of the state
15 must dispose of them on the merits. *O'Sullivan v. Boerckel*, 526 U.S.
16 838, 842, 844-45 (1999). A district court may raise a failure to
17 exhaust *sua sponte*. *Stone v. San Francisco*, 968 F.2d 850, 856 (9th
18 Cir. 1992.)

19 In his Petition, Petitioner does not allege that he has presented
20 any of his grounds for relief to the California Supreme Court.
21 Further, a check of the California Appellate Courts' website does not
22 show any filings since the date Petitioner's parole was revoked.
23 Thus, it appears that the Petition is completely unexhausted and is
24 subject to dismissal on that basis. See *Rasberry v. Garcia*, 448 F.3d
25 1150, 1154 (9th Cir. 2006).

1 IT IS THEREFORE ORDERED that, no later than March 19, 2010,
2 Petitioner shall inform the Court in writing why this case should not
3 be dismissed for failure to exhaust. Failure to timely file a
4 response will result in a recommendation that this case be dismissed.

5
6 DATED: February 23, 2010.

7
8 
9 PATRICK J. WALSH
10 UNITED STATES MAGISTRATE JUDGE
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

28 S:\PJW\Cases-State Habeas\UPTON, D 253\OSC dismiss pet.wpd